Supreme Court, U.S.
FILED

No. 00-567 OCT 12 2000

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

RONALD MOSKOWITZ
Petitioner,

--against--

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in light of Lilly v. Virginia, 119 S. Ct. 1887 (1999), plea allocutions of an alleged co-conspirator that have been scripted with the assistance of the prosecutor and that shift or spread blame for the charged criminal conduct to the defendant on trial, may be admitted against that defendant absent confrontation and cross-examination of the allocutor.

2. Whether, in light of Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), due process demands that the amount of loss -- the factual determination that dictates the length of the sentence in a federal fraud case -- be submitted to the jury and determined under a reasonable doubt standard.

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The Opinion of the Court of Appeals for the Second Circuit is reported at 215 F.3d 265 and is reproduced in the Appendix at A. 1. The Order denying the Petition for Rehearing and for Rehearing En Banc is reproduced at A. 13.

JURISDICTION OF THIS COURT

The Opinion of the Court of Appeals was filed on May 25, 2000. Appellant filed a timely Petition for Rehearing with suggestion for Rehearing En Banc. The Petition was denied by Order filed on August 22, 2000.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person . . . shall be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

STATEMENT OF THE CASE

Petitioner Dr. Ronald Moskowitz, the CEO of a small publicly-traded corporation, Ferrofluidics Corp. ("Ferro"), which Dr. Moskowitz founded in 1968 and took public in 1981, was convicted of one count of conspiracy and one count of securities fraud and sentenced to a term of imprisonment of 97 months. His appeal focused largely on the government's introduction of a plea allocution by Jan Kirk, Ferro's Chief Financial Officer. Kirk engaged in numerous frauds, but, most particularly, he engineered a fraudulent private placement using his friends and family to "park" Ferro stock.

Kirk was a singularly dishonest individual who convinced the people close to him to participate in a fraud, using aliases so the fraud could not be traced back to him. Kirk then insisted that these friends and family members pay him kickbacks. When his scheme began to unravel, he urged his accomplices to engage in perjury and to falsely implicate Dr. Moskowitz. He even went to the effort of sending the SEC anonymous letters from phony mail drops, falsely accusing Dr. Moskowitz of fraudulent activities and describing himself and his cronies as the only "honest managers" of Ferro.

A few months before Dr. Moskowitz's trial was scheduled to begin, Kirk, who was indicted separately on separate charges, pled guilty to a conspiracy to violate the securities laws, securities fraud, making false statements to the government, and conspiracy to obstruct justice and commit perjury in connection with the "sham" private placement. His false statement, obstruction and perjury convictions all involved false accusations he made, or

persuaded others to make, against Dr. Moskowitz in connection with the "sham" private placement.

Prior to his plea allocution, Kirk's counsel and the prosecutor discussed a cooperation agreement. The prosecutor rejected Kirk's offers to cooperate, undoubtedly concerned about Kirk's serious credibility problems. But the prosecutor also suggested language to be included in Kirk's plea allocution, language that would allow Kirk to be a witness against Dr. Moskowitz without ever taking the stand.

At his plea allocution, Kirk, taking into consideration the prosecutor's language, gave a lengthy and detailed statement, not only of his own culpability, but of the role allegedly played in the conspiracy by another Ferrofluidics employee. This included the following:

> "In April of 1992, I participated in arranging sham sales of 420,000 shares in private placement of restricted Ferrofluidics stock that totaled 720,000 shares, which I also referred to as private placement. I was told by a Ferrofluidics employee that the stocks would soon be purchased by legitimate buyers, but those buyers would not be purchasing this stock until sometime in the future.
>
> "I was further told that the delay was at least partly attributable to the fact that the transferability of the stocks was restricted. To free the stocks from its restrictions, I found three intermediary sham buyers with whom

> the stocks were parked, therefore, enabling it to later be transferred to real buyers without the restrictions.
>
> "I did this with the agreement of another employee at Ferrofluidics. The sale to these three intermediary sham buyers was not bona fide. I agreed with each of them that they would not be at risk for any loss in their purchase of the stock and also that they would not gain from it. Through an agreement with a Ferrofluidics employee, I was given $75,000 of company funds to use to compensate the three intermediary buyers. I arranged with the three intermediary buyers to have a portion of the $75,000 returned to me.

(App.15-16) (emphasis added)[1]

Although the allocution was unusually detailed, and repeatedly referred to the involvement of a Ferro employee – an employee sufficiently ranking in the company to devise the scheme and provide Kirk with the funds to pay off his purchasers -- the prosecutor, anticipating the upcoming Moskowitz trial, was not satisfied. He insisted that Kirk "clarify" that the "Ferrofluidics employee" with whom he allegedly conspired was a "senior executive and officer" – the very identifying phrase Kirk used to refer to Dr.

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[1] Kirk also described how he, along with other Ferro employees, falsely accounted for the private placement on Ferro's books and records, and misrepresented the nature of the transaction to Ferro's auditors.

Moskowitz in the portion of his allocution addressing his perjury and obstruction of justice.

Kirk's counsel initially rebuffed this "attempt to get testimony from Mr. Kirk." He commented that the prosecutor had refused a cooperation agreement with Kirk and was trying to "confirm certain things" through a back-door of a plea allocution. (App. 108-11) Nevertheless, Kirk, still "willing" to cooperate, agreed to the prosecutor's demand and expanded on his plea, "clarifying" that:

> In response to the area concerning the private placement, my statement was that I had worked in conjunction with another employee. The addition is that other employee was an officer of the company.

(App. 19) (emphasis added)

Kirk's sentencing was delayed, so he retained a Fifth Amendment privilege, which he asserted, refusing to testify at Dr. Moskowitz's trial. Over objection, the prosecutor was permitted to introduce virtually all of Kirk's plea allocution, including the "clarification," about the "officer of the company" under the hearsay exception for statements against penal interest. (App. 751-53, 805-10)[2] As required

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[2] Initially, the Court had indicated that it would exclude the "clarification" about the "officer of the company," but that, if it did, the defense would be precluded from arguing that the "employee" who conspired with Kirk was someone other than Dr. Moskowitz. Faced with this Hobson's choice, defense counsel reluctantly agreed to admission of the "officer of the company"

under Second Circuit law, the judge told the jury that this confession by Kirk was admissible to establish whether there was a conspiracy to commit securities fraud, and what, if anything, Kirk had done to further the conspiracy, and not on the question of whether Dr. Moskowitz – the only Ferro employee/officer on trial and the only individual with sufficient corporate authority to provide funds to Kirk to pay off the sham purchasers -- was the member of the conspiracy referred to by Kirk in his plea. (App. 810-11)

Based on his understanding that he could argue that Kirk was referring to another Ferro officer, during his closing, defense counsel argued that Kirk was referring to Steven Morin, Ferro's Chief Accounting Officer, who, in the government's words, was one of the "three co-conspirators in the company" involved in the sham private placement. (App. 1036) Unless Kirk's reference in his plea allocution to "an officer of the company" could only be interpreted as referring to Dr. Moskowitz, this was an appropriate argument. (App. 600-01, 1036) Nevertheless, the trial judge, apparently understanding the plea allocution to unambiguously refer to Dr. Moskowitz, lambasted defense counsel, and, despite the limiting instruction it had given the jury earlier, permitted the government in its rebuttal to argue that Kirk did not mean Morin. (App. 1019-22)

The prosecutor took full advantage of this leeway. He represented to the jury that Kirk had pled guilty to "three different crimes ... one of [which] was participating in [a] securities fraud scheme with the defendant." (App. 1030)

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language. (App. 745, 756-57, 759)

(emphasis added) And, at the conclusion of the rebuttal – the very last thing the jury heard – the prosecutor read aloud from the plea, urging the jury to "look at the guilty plea," in particular to focus on the language about "an officer of the company." (App. 1082-84)

On appeal, Dr. Moskowitz, relying heavily on this Court's recent decision, Lilly v. Virginia, 527 U.S. 116 (1999), holding that the Confrontation Clause was violated by the admission against the defendant of an accomplice's out-of-court statement against penal interest that also incriminated the defendant, argued that the admission of Kirk's blame-spreading plea allocution violated his Confrontation Clause rights. As Dr. Moskowitz explained, the plea allocution, even without the "clarification," pointed a finger at Dr. Moskowitz, Kirk's superior, the only Ferro employee on trial, and, as the jury knew, the only individual who could even be prosecuted for participating in the alleged conspiracy since the other Ferro employees involved in the sham private placement had all been granted immunity.

The Second Circuit, which for many years has allowed prosecutors to introduce plea allocutions by one defendant against another defendant, with only passing reference to Lilly, reaffirmed its case law on the admissibility of plea allocutions and, despite the absence of confrontation or cross-examination of Kirk, the most unreliable of witnesses, upheld the admission of Kirk's allocution against Dr. Moskowitz.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS ON THE ADMISSIBILITY OF PLEA ALLOCUTIONS, TO REVIEW THE SECOND CIRCUIT'S UNIQUE PRACTICE OF ALLOWING PROSECUTORS TO INTRODUCE PLEA ALLOCUTIONS DESPITE THE ABSENCE OF CROSS-EXAMINATION, AND TO RESOLVE WHETHER THAT PRACTICE COMPORTS WITH THE CONFRONTATION CLAUSE

The Second Circuit, alone among the federal Courts of Appeals,[3] has allowed prosecutors to routinely introduce

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[3] Throughout these proceedings, the government has not cited to another federal court that has upheld the admission of a plea allocution. A few other Circuits have rejected efforts to admit plea allocutions into evidence. See, e.g. United States v. Powell, 894 F.2d 895 (7th Cir.), cert. denied, 495 U.S. 939 (1990) (upholding decision to exclude plea allocution sought to be introduced by defendant pursuant to Rule 804(b)(1) because prosecutor did not have the chance to cross-examine the declarant at the plea hearing); United States v. Lowell, 649 F.2d 950 (3d Cir. 1981) (not error to preclude portion of plea allocution since not directly against penal interest).

As one commentator has noted, the Second Circuit's unique case law on plea allocutions cannot be reconciled with Bruton v. United States, 391 U.S. 123 (1968), and Gray v. Maryland, 523 U.S. 185 (1998), barring the admission of a defendant's confession, even though against that defendant's penal interest, if, expressly or by

the plea allocution of one defendant at the trial of another defendant. See, e.g., United States v. Winley, 638 F.2d 560 (2d Cir. 1981), cert. denied, 455 U.S. 959 (1982); United States v. Scopo, 861 F.2d 339 (2d Cir. 1988), cert. denied, 490 U.S. 1048 (1989); United States v. Williams, 927 F.2d 95 (2d Cir.), cert. denied, 502 U.S. 911 (1991); United States v. Vergera, 173 F.3d 847 (2d Cir.), cert. denied, 120 S. Ct. 255 (1999); United States v. Gallego, 191 F.3d 156, 167 (2d Cir. 1999), cert. denied, 120 S. Ct. 961 (2000); United States v. Smith, 198 F.3d 377, 384 (2d Cir. 1999); United States v. Dehaney, 205 F.3d 1325 (2d Cir.), cert. denied, 120 S. Ct. 2024 (2000); United States v. Moskowitz, 215 F.3d 265 (2d Cir. 2000); United States v. Wilson, 216 F.3d 1074 (2d Cir. 2000).

Theoretically, the allocution, with all references to the defendant on trial redacted, is admitted only to establish the existence of a conspiracy, and not the defendant's membership in the conspiracy. Even that creates Confrontation Clause problems because whether or not there is a conspiracy is often the key factual determination that the jury must make, and the plea allocution constitutes evidence on this crucial issue that has not been tested under the crucible of cross-examination.

But, as is often the case, theory and practice are not the same, and, in fact, prosecutors have been increasingly aggressive in their use of plea allocutions. As this case demonstrates, prosecutors actively participate in the crafting of plea allocutions that do more than simply acknowledge

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implication, it inculpates another defendant on trial. Rosenberg, The Future of Defendant Confessions, 30 Seton Hall L. Rev. 516, 539 (2000).

the existence of a conspiracy; they also spread blame for the allocutor's criminal conduct to a defendant who is awaiting trial. Prosecutors, as in this case, can then postpone the sentencing of the allocutor so that he retains a Fifth Amendment right and is technically "unavailable" to testify at the defendant's trial, thus avoiding potentially ruinous cross-examination. The plea allocution can then be used to tie the defendant on trial into the conspiracy to which the absent allocutor has testified. With the decision in this case, prosecutors in the Second Circuit have been given a license to create devastating testimony against the defendant on trial -- testimony that the prosecutor knows will never be subjected to cross-examination, the "greatest legal engine ever invented for the discovery of truth." California v. Green, 399 U.S. 149, 158 (1970).

This Petition asks this Court to intervene. Despite repeated protests to a practice that is increasingly out of control, the Second Circuit refuses to re-examine whether its unique case law in this area comports with this Court's Sixth Amendment jurisprudence. This Court has consistently recognized that accomplice statements that shift or spread blame to another defendant are inadmissible against that defendant absent confrontation and cross-examination. See Bruton v. United States, 391 U.S. 123 (1968) (admission of an accomplice's confession against the defendant violated the defendant's Sixth Amendment rights) Williamson v. United States, 512 U.S. 594 (1994) (non-self-inculpatory portions of an accomplice's statement are inadmissible against another defendant pursuant to F.R.E. 804(b)(3)); Gray v. Maryland, 523 U.S. 185 (1998) (even a redacted confession is inadmissible against the defendant if the redaction could lead the jury to speculate the redactions refer to the defendant).

The Court's unbroken commitment to the principle that any portion of an accomplice's confession that inculpates another, directly or by implication, is inherently unreliable was reaffirmed just recently in Lilly v. Virginia. 527 U.S. 116 (1999). In Lilly, the Court held that it will rarely, if ever, be constitutionally permissible to introduce against a criminal defendant an accomplice's out-of-court confession procured by the government, even if that confession might otherwise fall within an exception to the hearsay rules for statements against penal interest. As the plurality wrote:

> **It is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old ex parte affidavit practice – that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing.**

Id. at 137 (emphasis added).

Lilly did not command a majority opinion. But all of the opinions – the plurality opinion and the concurrences – make it clear that it is constitutionally impermissible to admit the non-self-inculpatory portions of an accomplice's "statement against penal interest" absent confrontation and cross-examination. Yet, here, the government was allowed to introduce Kirk's statement that "he was told by a Ferrofluidics employee/officer that the stocks would soon

be purchased by legitimate buyers;" that he was assured by this Ferro employee/officer that any delay was due to restrictions on the transferability of the stock; and, most importantly, that he was "given $75,000 of company funds" by this Ferro employee/officer in order to pay off the sham purchasers. These are classic blame-shifting statements that would be inadmissible under any of the Lilly opinions.

To be sure, because there was no majority opinion in Lilly, its import is uncertain. Four members of the Court held that the hearsay exception for statements against penal interest, when the hearsay is offered, not against the declarant, but against an alleged accomplice of the declarant, was not "firmly rooted," but of "quite recent vintage." Id. at 130. Lacking a majority, it is arguably unclear whether a court must examine the inherent reliability of any accomplice statement that is being offered against the non-declarant, or whether the court can justify admissibility of an entire statement (in this case, an allocution) on the broad legal principle that much of the statement is against the declarant's penal interest.

It is perhaps this lack of certainty that has contributed to the Second Circuit's unwillingness to revisit its case law on plea allocutions. Before Lilly, the Second Circuit was of the opinion that, because plea allocutions subject the declarant to criminal liability, they are admissible under the hearsay rules without regard to Confrontation Clause concerns. Scopo, 861 F.2d at 348. Since Lilly, the Second Circuit, without even acknowledging the plurality opinion in Lilly, has repeatedly refused to address whether statements against penal interest are admissible against the non-declarant pursuant to a "firmly rooted" hearsay exception. (A. 6) See also Gallego,

191 F.3d at 167; Wilson, 216 F.3d 1074.[4] This Court should grant this Petition to make crystal clear that that is no longer an open question and that reliance on the "penal interest" hearsay exception cannot substitute for a rigorous examination of the inherent reliability of the out-of-court statement.

The Second Circuit also has ignored the views expressed by Justices Scalia and Thomas on the scope of the Confrontation Clause. Because the Confrontation Clause was intended to protect against the ancient English practice of obtaining extrajudicial testimony from a co-conspirator to use against the defendant on trial, Justices Scalia and Thomas deem critical whether the government has been involved in production of extrajudicial "formalized testimonial material." Lilly, 527 U.S. at 143 (Scalia, J., concurring); White v. Illinois, 502 U.S. 346, 364-65 (1992) (Thomas, J., concurring). Plea allocutions are paradigmatic governmentally-procured testimony. They are scripted beforehand by the defendant and his counsel, and then reviewed by the prosecutor. As this case vividly demonstrates, the government can effectively veto a plea allocution that does not meet with its approval and can even

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[4] The Second Circuit would be hard-pressed to hold that plea allocutions are admissible pursuant to a "firmly rooted" hearsay exception. As late as 1950, the Second Circuit reversed a conviction where the prosecution was permitted to introduce a plea allocution against a non-declarant defendant. United States v. Hall, 178 F.2d 853 (2d Cir. 1950). The Court first upheld the admission of a plea allocution in United States v. Winley, 638 F.2d 560 (2d Cir. 1981).

dictate how much detail the allocutor provides in his description of his alleged accomplices.

Recognizing that, after Lilly, it may not be permissible to rely solely on the hearsay rules as justification for the admission of plea allocutions, the Second Circuit has superficially examined whether the plea allocution bears "particularized guarantees of trustworthiness." (A. 6) But instead of the exacting scrutiny this Court has demanded, the Second Circuit has substituted its own lenient test for determining the inherent trustworthiness of an accomplice statement.

To this Court, it is highly unlikely that the presumption of unreliability that attaches to accomplice blame-spreading statements can be rebutted "when the government is involved in the statement's production, and when the statements describe past events and have not been subjected to adversarial testing." 527 U.S. at 143. To the Second Circuit, in contrast, a plea allocution is presumptively reliable because it is theoretically against penal interest and is given under oath, regardless of whether the prosecutor was involved in its production, or who it is being offered against, or whether it shifts or spreads blame. (A. 6) Reliability is presumed even when the allocutor, like Kirk, is a convicted perjurer, willing to lie under oath, who has pled guilty to falsely implicating the very defendant against whom the allocution is being offered.

The Second Circuit has provided prosecutors with a virtual road map for how to obtain testimony against a defendant that will never be subjected to cross-examination. The Second Circuit alone among the federal courts allows prosecutors to use untested plea allocutions as substantive

evidence against a criminal defendant. This Court should grant certiorari to determine whether the Second Circuit's decisions can be reconciled with the Confrontation Clause and with the principles of Bruton, Gray, and Lilly, and to resolve the conflict in the Circuits on this issue.

II. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER APPRENDI v. NEW JERSEY GOVERNS "LOSS" DETERMINATIONS UNDER THE SENTENCING GUIDELINES AND WHETHER DUE PROCESS IS VIOLATED WHEN A DEFENDANT IS SENTENCED BASED ON THE AMOUNT OF "LOSS" AND THAT FACTUAL DETERMINATION IS NOT SUBMITTED TO THE JURY

In a federal criminal case involving allegations of fraud, the government is not required to prove that the defendant's conduct led to any loss. Under the Sentencing Guidelines, however, the amount of "loss" – whether "actual" or "intended" -- drives the sentence. See U.S.S.G. § 2F1.1. The greater the losses, the longer the sentence. Thus, in any criminal fraud case, even though the jury has never addressed the question of whether defendant's conduct caused any harm, or whether the defendant even intended to cause harm, the resolution of that question can dictate whether the defendant is sent to jail for many years (as in this case), for a brief time, or even for no time at all.

In this case, the jury was not asked to address whether Dr. Moskowitz's allegedly fraudulent activities caused shareholders of Ferrofluidics any harm. Under existing law, that was not relevant to any of the charged crimes. Yet, at sentencing, that was the key issue. After a year of litigation over whether and how much the base

offense level of six should be adjusted to reflect losses, the District Court settled on $6.1 million – the amount paid by Ferro in a settlement of a class action shareholder's suit – and enhanced Dr. Moskowitz' sentence by 14 levels.[5] Thus, instead of facing a term of imprisonment of 21-27 months, Dr. Moskowitz's potential sentence was 97-121 months, a sentencing range exposing Dr. Moskowitz to a sentence potentially longer than the 10 year maximum set by statute for securities fraud.

Whether a penalty enhancement may be imposed by a judge based on a preponderance of the evidence, or whether it may be imposed only after the jury has made a determination based on a reasonable doubt standard, is a question that this Court has repeatedly revisited. This Court has expressed a heightened concern that a defendant's due process right to a jury verdict based on proof beyond a reasonable doubt not be abridged by the treatment of a determinative sentencing fact as a mere "sentencing factor." Consequently, in the last two years, the Court has three times concluded that sentencing enhancements must be submitted to the jury. Apprendi v. New Jersey, 120 S. Ct. 2348 (2000) (due process violated by statute that permitted judge to enhance penalty over the statutory maximum if crime motivated by "hate"); Jones v. United States, 526

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[5] The Second Circuit approved of this measure of loss, which not only takes the key sentencing determination away from the jury, but transfers that determination to private litigants who have independent reasons for agreeing to a settlement amount. (A. 10-11) Should this Court decide to review the loss issue raised in this Petition, the Court should also review the propriety of the unprecedented measure of loss adopted by the Second Circuit.

U.S. 227 (1999) (provision in federal carjacking statute enhancing sentence if serious bodily injury results is element of offense that must be submitted to the jury); Castillo v. United States, 120 S. Ct. 2090 (2000) (provision of 18 U.S.C. § 924(c) enhancing penalty for use of a "machine gun" during commission of crime constitutes a sentencing factor that must be decided by the jury). But see Almendarez-Torres v. United States, 523 U.S. 224 (1998) (determination of recidivism can be resolved by the court).

Most recently, in Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), this Court held that the Due Process Clause of the Fourteenth Amendment requires that a factual determination that increases the sentence for an offense above the statutory maximum be made by a jury based on proof beyond a reasonable doubt. Explaining its decision, the Court wrote that:

> We endorse the statement of the rule set forth in the concurring opinion in ... [Jones]: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Id. at 2362-63, quoting Jones, 526 U.S. at 252-53.

As the dissent recognized, the reasoning in Apprendi suggests that other sentencing factors that, until now, have been determined by the court and not the jury, including sentencing determinations under the Sentencing Guidelines,

might well be subject to a similar due process challenges. 120 S. Ct. at 2390 (Breyer, J., dissenting).

In just the few months since Apprendi has been decided, it has engendered numerous conflicting decisions. This Court has granted certiorari and vacated the judgment in several federal cases involving drug offenses. See Jones v. United States, 120 S. Ct. 2739 (2000), vacating 194 F.3d 1178 (10th Cir. 1999) (holding quantity of drugs under 18 U.S.C. § 841(b) is sentencing determination that may be made by judge); Burton v. United States, 2000 WL 798515 (2000), vacating 211 F.3d 125 (5th Cir. 2000); Blue v. United States, 2000 WL 1451376 (2000) and Gibson v. United States, 2000 WL 1451396 (2000), vacating 187 F.3d 631 (4th Cir. 1999); Wims v. United States, 2000 WL 366962 (2000), vacating 207 F.3d 661 (11th Cir. 2000).

A number of Circuit courts have held that Apprendi requires that a jury decide the quantity of drugs and other sentencing factors under 21 U.S.C. § 841. See United States v. Nordby, 2000 WL 1277211 (9th Cir. 2000); United States v. Rebmann, 2000 WL 1209271 (6th Cir. 2000); United States v. Aguayo-Delgado, 220 F.3d 926 (8th Cir. 2000); United States v. Sheppard, 219 F.3d 766 (8th Cir. 2000). Other courts, however, have held that other sentencing factors can be determined by the court. See United States v. Hernandez-Guardado, 2000 WL 1264596 (9th Cir. 2000); United States v. Smith, 2000 WL 1160801 (7th Cir. 2000).

"Loss" under the Guidelines is a unique sentencing enhancement. Unlike sentencing factors that involve the sentencing court's review of the trial record, e.g. whether the crime involved more than minimal planning, the

defendant's role in the offense, or whether there was an abuse of trust, the amount of loss is a factual determination that the trial court must make, in most cases, independent of the trial record. Moreover, unlike other sentencing factors, such as whether to grant the defendant an acceptance of responsibility credit, or whether to upwardly or downwardly depart based on the defendant's particular characteristics or the particular characteristics of his crime, it does not depend on the exercise of the trial court's sentencing discretion, but involves concrete evidentiary determinations.

The amount of the alleged "loss" is the factual determination that dictates the length of a sentence in a federal criminal fraud case. In light of Apprendi, and because the federal courts are unsure of the scope of Apprendi, this Court should grant certiorari to decide whether due process demands that loss enhancements in federal fraud cases be decided by the jury based on a reasonable doubt standard.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: May 1, 2000 Decided: May 25, 2000)

Docket Nos. 99-1745(L), 99-1769(CON)

UNITED STATES OF AMERICA,

Appellee,

—v.—

RONALD MOSKOWITZ and JAN R. KIRK,

Defendants-Appellants.

Before:

WINTER, *Chief Judge*,
FEINBERG, and CABRANES, *Circuit Judges.*

Appeal from a judgment entered in the United States District Court for the Southern District of New York (Michael B. Mukasey, *Chief Judge*) convicting and sentencing Moskowitz after a jury trial and sentencing Kirk pursuant to a guilty plea for, *inter alia*, securities fraud and conspiracy to commit securities fraud. We affirm.

ALAN M. DERSHOWITZ, Cambridge, Massachusetts (Amy Adelson and Nathan Z. Dershowitz, Dershowitz, Eiger & Adelson, P.C., New York, New York, of counsel), *for Defendant-Appellant Ronald Moskowitz.*

JESS FARDELLA, Lankler Siffert & Wohl LLP (Lisa A. Baroni, of counsel), New York, New York, *for Defendant-Appellant Jan R. Kirk.*

DAVID RAYMOND LEWIS, Assistant U.S. Attorney (Mary Jo White, United States Attorney for the Southern District of New York, George S. Cancellous, Assistant United States Attorney, of counsel), New York, New York, *for Appellee.*

PER CURIAM:

Ronald Moskowitz appeals from his conviction by a jury and his sentence entered by Chief Judge Mukasey. Jan Kirk appeals from his sentence entered pursuant to his guilty plea. Moskowitz was convicted of one count of securities fraud and one count of conspiracy to commit various securities fraud offenses. Kirk pleaded guilty to the same conspiracy; to causing false filings to be made with the Securities and Exchange Commission ("SEC"); to a conspiracy to obstruct justice, suborn perjury, and make false statements to the SEC and United States Attorney's Office; and to making false statements and representations to the United States Attorney's Office. The district court sentenced Moskowitz to 97 months' imprisonment, three years' supervised release, and a fine and special assessment; and Kirk to 63 months' imprisonment, three years' supervised release, and a fine and special assessment. We affirm.

We view the evidence in the light most favorable to the government. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). Moskowitz was Chief Executive Officer and Kirk Chief Financial Officer of Ferrofluidics Corporation ("Ferro"). In the late 1980s, Moskowitz got into financial trouble and needed to sell off a sizable portion of his equity stake in Ferro. To that end, he parked his holdings in a "family trust," subdivided these trust holdings among his grandchildren to avoid SEC reporting requirements, and sold millions of shares of stock, a fact unknown to the Ferro's public shareholders or to the market generally.

During this time, Moskowitz and Kirk executed a series of frauds designed to artificially inflate share prices, a fraud from which Moskowitz—as a seller of Ferro's stock—reaped the primary gains. Among these frauds were paying off an investment reporter and stock analyst to talk up the company; executing a sham private placement in which Moskowitz and Kirk found complicit or unknowing buyers who actually invested no capital in the corporation; executing a sham $12 million purchase order to inflate expectations; and falsifying public accounts to further these and other scams. Kirk also obstructed the ultimate SEC investigation into the wrongdoings, in part by sending anonymous letters to the SEC that falsely accused Moskowitz of various offenses for which Kirk was primarily responsible.

On appeal, Moskowitz argues principally that the district court's decision to admit Kirk's plea allocution was improper under the Federal Rules of Evidence, *see* Fed. R. Evid. 804(b)(3) (permitting exception to hearsay rule for statement against interest that "so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true"), and the Confrontation Clause, *see* U.S. Const. Amend. VI ("In all criminal prosecutions, the

accused shall enjoy the right . . . to be confronted with the witnesses against him."). We review the court's evidentiary decision for abuse of discretion and its application of constitutional standards *de novo*. *See, e.g.*, *United States v. Naiman*, No. 99-1336, 2000 WL 502498, at *11 (2d Cir. Apr. 27, 2000) ("Evidentiary rulings are reviewable only for abuse of discretion."); *United States v. Cruz-Flores*, 56 F.3d 461, 463 (2d Cir. 1995) ("We review the district court's application of constitutional . . . standards de novo.").

In his plea allocution, Kirk admitted to being involved in a conspiracy and participating with "another employee" in each of the predicate acts of the conspiracy. The government consented to redacting the only portion of the allocution in which Kirk had shifted blame, *i.e.*, when he had stated that he had acted "with the agreement *and at the direction* of another employee at Ferrofluidics." Immediately after admitting the Kirk allocution, the district court gave a clear limiting instruction:

> Please understand . . . that you may consider [Kirk's allocution] only on the following two issues: (1) whether there was a conspiracy or scheme to commit securities fraud, to make false statements and submit false documents to the [SEC], to lie to the auditors, and to create false entries in Ferrofluidics' books and records; and (2) what if anything Jan Kirk did in order to further the objects of that conspiracy if you find that it existed.
>
> However, the question of whether the defendant on trial, Dr. Moskowitz, was also a member of that conspiracy or the scheme alleged in the indictment is an issue for which you will have to rely on other evidence. There is no evidence in these statements naming any other defendant or co-conspirator.

> If you find, based in part on these statements, that a conspiracy or a scheme as charged in the indictment existed, you must decide as a separate question whether the defendant on trial, Dr. Moskowitz, was a part of the alleged conspiracy or scheme, based entirely on the other evidence in the case. There is nothing in these statements that answers that question one way or the other.

Given that the allocution was clearly against Kirk's penal interest, that the only blame-shifting portion of the allocution was redacted, and that the court gave a limiting instruction that we must presume the jury followed, *see, e.g.*, *United States v. Ebner*, 782 F.2d 1120, 1126 (2d Cir.1986) (upholding admission of evidence against Fed. R. Evid. 403 challenge in light of limiting instructions and "presumption that juries will follow [them]") (quoting *Watkins v. Sowders*, 449 U.S. 341, 347 (1981)), the admission of Kirk's plea allocution under Rule 804(b)(3) was within the district court's discretion.

We also see no error to the admission of the plea allocution under the Confrontation Clause. The Supreme Court's plurality opinion in *Lilly v. Virginia*, 527 U.S. 116 (1999), did not change the established rule that "when a declarant is unavailable to testify at trial, his or her hearsay statement is sufficiently dependable to allow its untested admission against an accused when (1) the evidence falls within a firmly rooted hearsay exception or (2) it contains particularized guarantees of trustworthiness such that adversarial testing would be expected to add little, if anything, to the statements' reliability," *United States v. Gallego*, 191 F.3d 156, 167 (2d Cir. 1999) (internal alterations and quotation marks omitted), *cert. denied*, 120 S. Ct. 961 (2000). *See Lilly*, 527 U.S. at 122-24 (plurality opinion of Stevens, Souter, Ginsberg, and Breyer, JJ.); *id.* at 144-48 (concurring

opinion of Rehnquist, C.J., and O'Connor and Kennedy, JJ.). Although we have declined to decide whether a declaration against interest admitted under Rule 804(b)(3) is a "firmly rooted" exception to the hearsay rule, we have found "particularized guarantees of trustworthiness" where, *inter alia*, (1) the plea allocution "undeniably subjected [the defendant] to the risk of a lengthy term of imprisonment, even if it was also made in the hope of obtaining a more lenient sentence"; (2) "the allocution was given under oath"; and (3) "the district court instructed the jurors that they could consider [the defendant's] allocution only as evidence that a conspiracy existed and not as direct evidence that defendants were members of that alleged conspiracy or that they were otherwise guilty of the crimes charged against them." *Gallego*, 191 F.3d at 167 (internal alterations and quotation marks omitted). The instant case having the same "particularized guarantees of trustworthiness" found sufficient in *Gallego*, there was no Confrontation Clause violation in the admission of the plea allocution.

Moskowitz contends that even if the plea allocution was properly admitted into evidence, his Confrontation Clause rights were violated by the admission of an addendum to Kirk's main allocution in which he clarified: "In response to the area concerning the private placement, my statement was that I had worked in conjunction with another employee. The addition is that other employee was an officer of the company." However, Moskowitz was offered the opportunity to redact this portion of the allocution and for strategic reasons specifically requested that the statement be included with the main allocution. Consequently, Moskowitz cannot now argue that this statement unfairly implicated him. *Cf. Strickland v. Washington*, 466 U.S. 688, 690 (1984) (noting that trial counsel's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually

unchallengeable"). Moreover, any harm from admission of the addendum was mitigated by the district court's limiting instruction.

Similarly, Moskowitz's contention that his Confrontation Clause rights were violated by the government's rebuttal summation is unpersuasive. On his summation, Moskowitz argued that the Kirk allocution's reference to "another employee" implicated Ferro employee Steve Morin, but not Dr. Moskowitz, and that the allocution should be read as referring to Dr. Moskowitz only inasmuch as it referred to the "officer" whom Kirk had falsely implicated. The district court properly permitted the government to give a limited rebuttal to this claim. In that rebuttal, the government directed the jury's attention to the actual allocution and pointed out that nothing in the allocution would suggest that the "other employee" was Steve Morin and that nothing in the allocution could be read to absolve Moskowitz from guilt as merely the "officer" falsely implicated by Kirk's previous perjury. Moskowitz did not object to the prosecution's statements, and no plain error resulted therefrom.

Finally, we agree with the district court that, even assuming *arguendo* that a violation of Confrontation Clause rights occurred, such error "was harmless beyond a reasonable doubt in view of the direct and overwhelming evidence of Moskowitz's guilt, including the testimony of co-conspirators who themselves were involved in committing the charged crimes with Moskowitz, at Moskowitz's direction, and for Moskowitz's benefit." Transcript of September 9, 1999 Hearing, at 6-7; *cf. Gallego*, 191 F.3d at 168 ("Even were we to conclude that the district court erred by admitting [the] plea allocution into evidence, the record before us makes it clear that any such error would have been harmless.").

Moskowitz also challenges the district court's decision not to permit Moskowitz to elicit testimony going to Kirk's reputed sexual history, to his reputation for not following orders at Ferro, to his reputed "management style" at a prior company, or to his specific actions that might implicate his credibility. Rule 806 renders Rule 608's impeachment rules applicable to a declarant's out-of-court statements. Under Rule 608, "[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but . . . the evidence may refer only to character for truthfulness or untruthfulness, and [s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, . . . may not be proved by extrinsic evidence." Fed. R. Evid. 608.

The district court did permit Moskowitz to introduce substantial evidence impeaching Kirk. Moreover, the government specifically conceded Kirk's untrustworthiness. Furthermore, the jury was aware, through the plea allocution, that Kirk had previously perjured himself. In this light, it was easily within the district court's broad discretion to limit Moskowitz's ability to impeach Kirk under Rule 608. *See, e.g.*, *United States v. Salemeh*, 152 F.3d 88, 131 (2d Cir. 1998), *cert. denied*, 525 U.S. 1112 (1999) (noting that district court judges have "wide latitude" under Confrontation Clause to "impose reasonable limits" on cross examination and limit "interrogation that is repetitive or only marginally relevant").

Moskowitz also argues that the district court erred in not permitting him to read aloud from false accusation letters targeting Moskowitz that Kirk had anonymously sent to the SEC. The letters were, however, admitted into evidence, with the exception of one letter that the defense itself objected to. There was thus no error in the district court's discretionary ruling limiting the manner in which the evidence was presented to the jury. *See* Fed. R. Evid. 611(a) ("The court shall

exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, [and] (2) avoid needless consumption of time . . . .").

Moskowitz also objects to the district court's decision to admit a videotaped deposition of a government witness who was suffering from a debilitating spinal condition. Under Rule 804(a)(4), testimony taken by deposition may be introduced in "situations in which the declarant . . . is unable to be present or to testify at the hearing because of . . . then existing physical or mental illness or infirmity." Fed. R. Evid. 804(a)(4). Moskowitz argues that the witness actually could have been flown in. However, the district court's determination is again reviewable only for abuse of discretion, and we see no such abuse in the court's factual determination that the witness was unable to testify in person due to physical infirmity. *Cf. United States v. Bell*, 500 F.2d 1287, 1290 (2d Cir. 1974) ("[W]e think that in the first instance it is up to the district judge to decide if the witness is truly 'unavailable'—a finding that we would not be quick to overturn.").

Moskowitz also argues that the district court erred in not using his proposed jury charge, which stated in relevant part:

> Some of the alleged misstatements in this case are, in one form or another, projections of future performance by Ferrofluidics. Projections are statements of opinion, not fact, and are not guarantees. They are simply predictions or forecasts about a company's future earnings.
>
> If you find that any of the alleged misstatements are projections of future performance they are not material as a matter of law, because they lack specificity and guarantees of future performance, and the government has

> failed to prove the crimes charged . . . with respect to those statements.

The district court instead used a standard charge on fraudulent representations and materiality. At the charge conference, Moskowitz made several objections and requests. However, he never requested that this language be used and never objected to the district court's use of the standard charge on fraudulent representations and materiality. Nor did Moskowitz take exception to the standard charge as given to the jury.

Having failed to object, Moskowitz cannot now claim error. *See* Fed. R. Crim. P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection."). Nor is he entitled to reversal for plain error, *see* Fed. R. Crim. P. 52(b). It is hardly clear that Moskowitz's draft charge "accurately represented the law in every respect," *United States v. Smith*, 198 F.3d 377, 386 (2d Cir. 1999). *See Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 124 (2d Cir. 1997) ("Under the securities laws, an assurance about the future that by necessary implication misrepresents present facts is clearly actionable."). Moreover, given the substantial evidence that Ferro's *current* books misrepresented its financial condition, Moskowitz was in any event not prejudiced by the failure to use his requested instruction.

Moskowitz also argues that the district court improperly calculated loss under § 2F1.1 of the sentencing guidelines, *see* United States Sentencing Guidelines ("U.S.S.G.") § 2F1.1(b)(1). His principal argument is that the court improperly relied on the settlement of consolidated class action claims against Ferro and its officers and directors.

We review the district court's findings of fact for clear error and reverse only if left "with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). If any permissible view of the evidence supports the fact finder's determination, we affirm. *See Hernandez v. New York*, 500 U.S. 352, 369 (1991).

A permissible view of the evidence easily supports the district court's determination. The government introduced evidence that estimated the loss at from $7.1 million to $18.3 million based on the decline in Ferro's share price upon the revelation of fraud. The district court also had an analysis from the class action plaintiffs' expert determining loss to the plaintiffs to be $30 million. In light of the ample evidence that would have permitted a reasonable fact finder to determine actual losses to be *higher* than the range of $5 million to $10 million that the district court found applicable to Moskowitz, the court was well within its discretion in reaching its loss calculation.

Finally, both Kirk and Moskowitz argue that the district court erred in applying a two-level enhancement for abuse of trust under U.S.S.G. § 3B1.3. Under section 3B1.3, "[i]f the defendant abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense," a two-level enhancement is warranted. The enhancement applies to positions "characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference)." U.S.S.G. § 3B1.3, comment. (n.1). We have determined that "the discretion must be entrusted to the defendant *by the victim*." *United States v. Broderson*, 67 F.3d 452, 456 (2d Cir. 1995) (emphasis added) (holding that government supplier who failed to comply with statutory disclosure requirements for doing business with government was

not in position of trust vis-a-vis government); *see also United States v. Jolly*, 102 F.3d 46, 48 (2d Cir. 1996) ("Limiting an enhancement for abuse of trust to the misuse of discretionary authority entrusted by the victim or on the victim's behalf is consistent with the examples given in the Commentary."). Moreover, "[t]his adjustment may not be employed if an abuse of trust . . . is included in the base offense level or specific offense characteristic." U.S.S.G. § 3B1.3.

Among the primary victims of the instant fraud were Ferro's shareholders, who were misled by the fraudulent inflation of Ferro's share price and the concealment of Moskowitz's sale of $14 million of Ferro stock. These frauds prevented them from making informed decisions regarding company officers and the propriety of retaining or buying more Ferro stock. These victims were public shareholders, who necessarily and typically entrust their corporate officers with fiduciary duties; they are thus clearly distinguishable from the arms' length creditors we considered in *Jolly*. *Cf. Jolly*, 102 F.3d at 48-49 ("A corporation's management of course owes a fiduciary duty to shareholders, and the looting of a corporation would likely lead to an enhancement for abuse of trust if not included in the particular offense characteristic." (citation omitted)). Because abuse of a position of trust is not a specific offense characteristic and is not included in the base offense level, *see* 15 U.S.C. § 78ff; U.S.S.G. § 2F1.1, the abuse of trust enhancement was properly applied.

We therefore affirm. Appellant's motion for release on bail pending appeal is denied as moot.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. Mackechnie
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, 22nd on the day of August two thousand.

USA

v. Dkt. No: 99-1745(L), 99-1769

Moskowitz Aug 22 2000

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Moskowitz.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service

and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, CLERK

By: /s/
Beth J. Meador,
Administrative Attorney

p o ccc
inbancdn_frm